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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BESSIE M. GLOVER,

Plaintiff and Appellant,

v.

ALLEN LUGER,

Defendant and Respondent.

C074344

(Super. Ct. No.
34-2012-00128292-CU-PN-
GDS)

Plaintiff Bessie M. Glover sued defendant Allen Luger for legal malpractice. The trial court granted defendant's motion for summary judgment and dismissed the complaint, finding defendant owed no duty to plaintiff because they were not in an attorney-client relationship. We affirm but on a different basis. Plaintiff failed to establish any harm she may have suffered was caused by defendant.

UNDISPUTED FACTS

Plaintiff sought legal assistance from defendant in 1978 regarding the dissolution of her marriage. The marriage was dissolved in 1979. The interlocutory judgment of dissolution granted plaintiff a portion of her ex-husband's retirement benefits. The trial court retained jurisdiction over the division of the benefits.

Defendant did not provide plaintiff with any legal advice or services after the dissolution judgment was entered.

Some 28 years later, plaintiff contacted defendant by telephone in 2007. She had reached 65 years of age, and she asked defendant when she could start to receive her share of her ex-husband's retirement benefits.

Defendant asked plaintiff if her ex-husband was still working. Plaintiff said yes. This was the only question defendant asked during the conversation.

Defendant told plaintiff she would have to wait until her ex-husband retired before she could receive benefits from his retirement plan. Defendant also informed plaintiff he was no longer practicing family law. The parties dispute whether defendant advised plaintiff to seek advice from another attorney.

This phone conversation lasted only two or three minutes. During that time, plaintiff did not ask defendant to perform any legal services regarding her ex-husband's retirement benefits, including obtaining a qualified domestic relations order (QDRO). Also, defendant did not promise to provide her legal advice or services regarding what she needed to do to obtain her share of the retirement benefits.

Plaintiff had no contact with defendant after the 2007 telephone conversation. After the conversation, plaintiff knew she would have to contact another attorney to assist her in obtaining her share of the retirement benefits once her ex-husband retired because defendant was no longer practicing family law.

On October 30, 2009, plaintiff's ex-husband retired from the United States Postal Service. Plaintiff learned of her ex-husband's retirement about two months later, in December 2009, in a text message from him.

In February 2010, plaintiff contacted an agency the parties refer to as the benefits division in Washington, D.C., and made a claim for her share of her ex-husband's retirement benefits. Later that year, the benefits division informed plaintiff she would need to contact a lawyer to determine the amount of benefits to which she was entitled. Plaintiff said she received this information in either April or May, or September or October.

Months later, on February 1, 2011, plaintiff contacted attorney Robert Kitay to assist her in obtaining her share of the retirement benefits. She did not have money to retain an attorney prior to this time.

Fifteen days later, on February 16, 2011, plaintiff's ex-husband died. In late 2011, after plaintiff had retained Kitay, she learned she was unable to obtain any portion of her ex-husband's retirement benefits due to his passing.

Plaintiff sued defendant for legal malpractice. She asserted she was denied a share of her ex-husband's retirement benefits because a QDRO was not completed before his death. She alleged defendant committed malpractice by (1) failing to ensure a QDRO was completed when the dissolution judgment was entered in 1979 or at the time of her 2007 telephone conversation with defendant; and (2) failing to advise her to seek counsel from an attorney more knowledgeable in family law.

Defendant filed a motion for summary judgment, and the trial court granted the motion. The court concluded the undisputed facts established defendant owed no duty to plaintiff to complete a QDRO either in 1979 or 2007, and he owed no duty in 2007 to advise plaintiff to consult with another attorney. QDRO's did not exist in 1979, and the telephone conversation in 2007 did not create an attorney-client relationship.

The trial court also rejected an additional argument plaintiff made in opposition to the summary judgment motion. Plaintiff claimed defendant was negligent for rendering a professional opinion informing her she would have to wait until her ex-husband retired before she could collect any of his retirement benefits. She argued defendant should not have made the statement because he was not an expert, and he also should have known a QDRO was required to collect retirement benefits.

The court found it was not clear how plaintiff contended defendant's statement was negligent, as she introduced no evidence showing the statement was inaccurate or false. It appeared plaintiff was arguing defendant was negligent for not informing her of the QDRO requirement. But defendant told her he was no longer practicing family law. There also was no attorney-client relationship and thus no duty to provide legal advice as a matter of law. The court entered judgment of dismissal against plaintiff.

DISCUSSION

Plaintiff appeals. She contends, first, defendant is liable because he failed to refer her to a family law attorney, a point she asserts is a disputed issue of material fact. She alleges had he done so, she would have had enough time to secure a QDRO. Second, she contends defendant was negligent in stating to her she had to wait until her ex-husband retired before she could begin receiving her share of his retirement benefits.

We conclude the trial court correctly granted summary judgment, as defendant proved plaintiff is unable to establish an element of her cause of action for legal malpractice as a matter of law. Assuming for purposes of argument only that an attorney-client relationship existed and defendant did not refer plaintiff to a family law attorney, we hold plaintiff failed to establish defendant's actions were a proximate cause of her damage.

We review the grant of a summary judgment motion de novo, "considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317,

334.) “[I]n moving for summary judgment, a ‘defendant . . . has met’ his ‘burden of showing that a cause of action has no merit if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials’ of his ‘pleadings to show that a triable issue of material fact exists but, instead,’ must ‘set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.’ (Code Civ. Proc., § 437c, subd. (o)(2).)” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

“To state a cause of action for legal malpractice, a plaintiff must plead ‘(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence.’ [Citation.] Whether an attorney sued for malpractice owed a duty of care to the plaintiff ‘is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances.’ [Citation.]” (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 693.)

To establish causation, plaintiff must show “either (1) but for the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm.” (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, italics omitted.) We deal here with the former. Under the “but for” test, “ ‘the actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.’ ” (*Id.* at p. 1240, quoting Rest.2d Torts, § 432, italics omitted.) “[T]he crucial causation inquiry is what would have

happened if the defendant attorney had not been negligent.” (*Viner v. Sweet, supra*, 30 Cal.4th at p. 1242, italics omitted.)

The undisputed evidence shows even if defendant had referred plaintiff to a family law attorney, plaintiff still would have sustained her alleged damage. After her 2007 telephone conversation with defendant, plaintiff knew she could begin collecting retirement benefits when her ex-husband retired. She also knew defendant was not going to act as her attorney and she would have to retain another attorney to assist her in obtaining her share of the benefits. In December 2009, plaintiff learned her ex-husband had retired and she could seek to recover her share of the benefits. In 2010, possibly as early as April, plaintiff was again advised to retain an attorney, this time by the federal agency responsible for the benefits, to help her determine the amount of benefit to which she was entitled. Plaintiff, however, did not contact attorney Kitay until February 1, 2011, more than three years after she spoke with defendant and knew she needed another attorney, and more than 14 months after she learned her ex-husband had retired. Because plaintiff knew she needed to retain an attorney after the 2007 phone conversation and in 2010 after notification from the federal agency, she cannot establish defendant’s failure to advise her to seek counsel caused her harm. Indeed, plaintiff admits she did not have sufficient financial resources to retain an attorney prior to February 2011. Thus, even if defendant had advised plaintiff in 2007 to seek advice from a family law attorney, plaintiff could not and would not have done so. Plaintiff cannot show any harm she suffered was caused by defendant.

Plaintiff also contends defendant was negligent when he stated she would have to wait until her ex-husband retired before she could begin collecting her share of his retirement benefits because defendant was not an expert. Any talk of negligence requires a showing of causation, and plaintiff, as already explained, cannot make that showing.

Defendant established plaintiff was unable to prove defendant’s actions were the proximate cause of her alleged harm. Because plaintiff cannot establish an element of

her malpractice cause of action, the trial court correctly granted summary judgment in favor of defendant.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, Acting P. J.

We concur:

MAURO, J.

HOCH, J.